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No. 99-536

IN THE
SUPREME COURT OF THE UNITED STATES

ROGER REEVES

Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1/]

AARP is a nonprofit membership organization of more than thirty-three million persons age 50 or older dedicated to addressing the needs and interests of older Americans. One of AARP's primary objectives is to achieve dignity and equality in the work place through positive attitudes, practices, and policies regarding work and retirement. AARP seeks to eliminate ageist stereotypes, encourage employers to hire and to retain older workers, and help older workers overcome the obstacles they encounter because of age. One-third of AARP's members are employed individuals, most of whom are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq*.

[1/] No counsel for either party authored any portion of this brief. No persons other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

The interpretation and application of the ADEA are of paramount importance not only to AARP, but also to the millions[2/] of older workers who rely on the Act to remedy work place age bias, such as that manifested in this case. Since 1985, AARP has filed more than 200 *amicus curiae* briefs in the federal courts regarding the proper interpretation and application of the ADEA. AARP has participated as *amicus curiae* in several recent cases in this Court which raised ADEA issues including *Oubre v. Entergy Operations, Inc*, 522 U.S. 422 (1998); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995); and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

This case materially impacts the viability of the congressionally mandated right to a jury trial in age discrimination cases. AARP respectfully submits that the court below misconstrued this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), to substitute its evaluation of the evidence for that of the jury and reject the jury's verdict for Reeves. It did so, as have other courts in a manifestly growing trend, despite the fact that the verdict was based on legally sufficient and exceptionally probative evidence, including a statement by an influential senior executive directly involved in Reeves's termination that he was "too damn old to do the job," demonstrating to the satisfaction of the jury that Sanderson's proffered reasons for its termination of Reeves were a pretext for willful age discrimination.

Where Congress has legislatively provided for a jury trial, courts should only in the rarest of circumstances nullify that right, and then only in accordance with the strict standards established by this Court. Any lesser standard only

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[2/] "As of 1995, approximately 41 million members of the nation's civilian workforce were age 45 or older." Marc Bendick et al., *No Foot in the Door: An Experimental Study of Employment Discrimination Against Older Workers*, Journal of Aging & Social Policy, Vol. 10(4) 1999, at 20 (citation omitted).

serves to undermine respect for judicial power. It simply cannot be said that no jury could have reasonably determined that Sanderson's actions were motivated by discriminatory animus. Moreover, the reasonableness of the jury's determination was effectively affirmed by the trial court's denial of Sanderson's motion for Judgment as a Matter of Law and its imposition of liquidated damages and award of front pay. Accordingly, the court below's reversal of the jury's finding and its misuse of judicial power is not only an affront to the jury but to the trial court as well. The court below was simply not in a position to fairly second guess the trial court.

Even more than other indicators of the continuing resistance to equal employment opportunity, disparaging epithets, slurs, stereotyping, and derogatory remarks regarding older workers provide a window into the hard-core prejudices which still confront our social, political, and economic institutions.[3/] In view of the Court's acknowledgment of the difficulty of proving discriminatory intent, *see U.S. Postal Serv. Bd. Of Governors v. Aikens*, 460 U.S. 711, 716 (1983), discounting the probative value of ageist comments by managers and other senior executives needlessly immunizes some of the worst discriminators from accountability.

Under *McDonnell Douglas*,[4/] Reeves's evidence was sufficient to support the verdict in his favor under even the most restrictive interpretation of *Hicks*. The Court must not

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[3/] One recent study, which found that older job applicants receive less favorable responses from employers than younger applicants 41.2 percent of the time, Bendick, et al., at 6, concluded that it provided "empirical, quantitative confirmation of an uncomfortable truth - that the contemporary American workplace is far from 'age blind.' The consequences of discrimination such as are documented here include not only injustice and economic hardship for individuals but also wastage of human resources and reductions in the nation's productivity." *Id.* at 21 (citation omitted).

[4/] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

countenance this attempt to substitute for *McDonnell Douglas* a sufficiency of the evidence analysis based on counterinferences of questionable validity drawn exclusively in favor of employer-defendants not by the jury, but by the court. It is critical to the effort to fulfill the promise of a discrimination-free work place that *McDonnell Douglas* remain viable for all employment discrimination litigants.

For these reasons, AARP submits this brief *amicus curiae*.[5/]

SUMMARY OF THE ARGUMENT

The court below misapplied the Court's decision in *Hicks*, impermissibly substituting its evaluation of the evidence for that of the factfinder under the guise of a sufficiency of the evidence review. Reeves satisfied all three requirements of *McDonnell Douglas* as construed by *Hicks*. Nevertheless, the court below freely discounted the probative value of Reeves's evidence, including the manifestly age-biased comments of a high corporate executive with extraordinary influence over the decision to fire the fifty-seven year old Reeves after forty years of employment, and inferred from Sanderson's evidence that it did not discriminate against Reeves.

The two comments by Powe Chestnut, Sanderson's Director of Manufacturing, first that Reeves was so old that he "must have come over on the Mayflower," and second that he was "too damn old to do the job," made within two months of his termination, are, along with his other proof, persuasive circumstantial evidence that Sanderson's proffered reason for firing Reeves, "shoddy record-keeping," was a pretext for age discrimination. In overturning the verdict for insufficient evidence, the court impermissibly substituted its evaluation of the evidence for that of the jury, which found not only that

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[5/] The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

Reeves was fired because of his age, but also that the discrimination was willful.

Due to the strength of his evidence of pretext, including the two ageist comments, the jury's verdict for Reeves must prevail. The Court should, therefore, reverse the judgment of the court below and reject this attempt to substitute its flawed sufficiency of the evidence analysis in place of *McDonnell Douglas*. To do otherwise would fully vindicate Justice Souter's criticism in his dissent in *Hicks* that the Court "abandons th[e] practical [*McDonnell Douglas/Burdine*] framework . . substituting a scheme of proof for disparate-treatment actions that promises to be unfair and unworkable...." *Hicks*, 509 U.S. at 525.

ARGUMENT

I. SINCE REEVES SATISFIED ALL OF THE *McDONNELL DOUGLAS* REQUIREMENTS, THE JURY'S VERDICT MUST STAND.

A. The *Hicks* Standard.

In an attempt to clarify the circumstances in which a plaintiff is entitled to prevail in a disparate treatment case, the Court in *Hicks* construed the requirements of the *McDonnell Douglas* indirect method of proof. The Court pointed out that under *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), at the third stage of the three-part burden-shifting proof paradigm of *McDonnell Douglas*, a plaintiff must be afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant [for the adverse employment action affecting plaintiff] were not its true reasons, but were a pretext for discrimination." *Hicks*, 509 U.S. at 515. The Court held that:

> [t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of

> mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination....

Id. at 511 (emphasis in original). The *Hicks* majority went on to state, however, that "a reason cannot be proved to be a 'pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Id.* at 515 (emphasis in original). *Hicks* further cautions that "[i]t is not enough ... to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id.* at 519 (emphasis in original). Thus, "[e]ven though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination*." *Id.* at 511 n.4 (emphasis in original).

Rather than resolving the problem of when a plaintiff is entitled to prevail, however, *Hicks* added to the confusion surrounding this issue.[6/] In the aftermath of *Hicks*, the lower courts developed two opposing views regarding the quantity and quality of evidence sufficient to support a plaintiff's verdict. First, despite the Court's admonition that if the trier of fact rejects the defendant's proffered reasons "no additional proof of discrimination is *required*," *id.* at 511, many lower courts, including the court below, have construed *Hicks* to

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[6/] *See, e.g., Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997)(*en banc)*, which held that after *Hicks* a finding of discrimination pursuant to *McDonnell Douglas* is reviewable for clear error and which, in five opinions spanning 59 pages, graphically illustrates the struggle of the lower courts to interpret and apply the *Hicks* decision. *See also Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (*en banc*), in which the court in four separate opinions struggled with the seemingly contradictory language in *Hicks*; the majority concluded that it could simply rely on its traditional sufficiency of the evidence analysis to sustain the jury verdict for plaintiff.

mean precisely the opposite: that even if the jury has found in favor of the plaintiff based on the *prima facie* case and proof of pretext, there must be some additional evidence directly linking the defendant's behavior to the adverse employment decision to support the verdict, the post-*Hicks* "pretext-plus" rule.[7/] Other courts, including the *en banc* Fifth Circuit, hold that the *prima facie* case coupled with the jury's rejection of the defendant's proffered reasons based on plaintiff's proof of pretext are ordinarily sufficient to support a verdict for plaintiff.[8/]

B. The Court Below Failed To Properly Apply *Hicks*.

Even though all three *Hicks* elements, the *prima facie* case, (abundant) evidence of pretext, and a finding of discrimination, are present, the court below nevertheless overturned the verdict for Reeves. The court was wrong to do so. First, Sanderson did not challenge the sufficiency of Reeves's *prima facie* case. *Reeves v. Sanderson Plumbing Products, Inc.*, 81 Fair Empl. Prac. Cases (BNA) 609, 612 (5th Cir. 1999). Second, Reeves proved to the satisfaction of

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[7/] The court below held that "whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under the ADEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision." *Reeves v. Sanderson Plumbing Prods. Inc.*, 81 Fair Empl. Prac. Cases (BNA) 609, 612 (5th Cir. 1999). *See, e.g., Vaughan v. Metrahealth Companies, Inc.*, 145 F.3d 197, 202 (4th Cir. 1998); *Fisher v. Vassar College*, 114 F.3d 1332, 1333 (2d Cir. 1997); *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994).

[8/] *See, e.g., Rhodes v. Guiberson Oil Tools, Inc.*, 75 F.3d 989, 994 (5th Cir. 1996) (*en banc*) ("In tandem with a prima facie case, the evidence allowing rejection of the employer's proffered reasons will often, perhaps usually, permit a finding of discrimination without additional evidence."); *Fuentes v. Perski*, 32 F.3d 759, 764 (3d Cir. 1994); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123 (7th Cir. 1994).

the jury that Sanderson's proffered nondiscriminatory reason for firing him, shoddy record-keeping, was a pretext for discrimination. Finally, the jury found not only that Sanderson had discriminated against Reeves, but that the discrimination was willful. *Id.* at 611.

Conceding that Sanderson's explanation for Reeves's termination "may very well be" pretextual, *id.* at 612, the court below nevertheless held that there was insufficient evidence for the jury to find that Reeves was discharged because of his age. Thus, "[d]espite the potentially damning nature of Chesnut's [sic] age-related comments," *id.* at 613, the court below rejected them as insufficient proof of discriminatory intent on the ground that "it is clear that these comments were not made in the *direct* context of Reeves's termination." *Id.* (emphasis added).

Rather, what is clear is that the two comments, both made by Chestnut, the Director of Manufacturing who was directly involved in the decision to terminate Reeves and who was married to the ultimate decisionmaker, Sanderson's president, are extraordinarily probative of discriminatory motive. The first statement, that Reeves was so old that he "must have come over on the Mayflower," was made within months of Reeves's termination; the second statement, that Reeves was "too damn old to do the job," was made within two months of his termination. The first statement is clear circumstantial or "indirect evidence" of discriminatory intent.[2/] The second is the verbal equivalent of the "smoking gun." There can hardly be any stronger circumstantial evidence of on-the-job age bias than a statement made by the boss, to the employee, on the job, within two months of his firing, that he is "too damn old to do the job."

[2/] *See, e.g., Burrell v. Bd. of Trustees of Ga. Military College*, 125 F.3d 1390, 1393 (11th Cir. 1997) (statements by a decisionmaker that are not direct evidence of discrimination may still be used as circumstantial evidence of discriminatory motive.)

C. Reeves's Circumstantial Evidence Is Sufficient To Support A Jury Verdict Under *McDonnell Douglas*.

The Court has acknowledged that the "question facing triers of fact in discrimination cases is both sensitive and difficult" because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *Aikens*, 460 U.S. at 716. Similarly, in *Thornbrough v. Columbus and Greenville R. R. Co.*, 760 F.2d 633, 638 (5th Cir. 1985), the Fifth Circuit pointedly stated its awareness of the difficulty of proving age discrimination: "Employers are rarely so cooperative as to ... inform a dismissed employee candidly that he is too old for the job." Yet in this case, where the employer specifically did that, informing Reeves that he was "too damn old to do the job," the Fifth Circuit inexplicably found Reeves's proof of discriminatory intent deficient.

The rejection of plaintiff's ageist comment evidence as insufficiently *direct* to support a verdict pursuant to *McDonnell Douglas* be speaks a fundamental misunderstanding not only of *Hicks*, but also of the probative value of ageist comments.

Chestnut's statement that Reeves was "too damn old to do the job" along with his remark that Reeves was so old that he "must have come over on the Mayflower" was sufficient circumstantial evidence to support the jury's verdict. Based on this evidence alone, the court below should not have granted judgment as a matter of law for Sanderson because "the facts and inferences" do not "point so strongly and overwhelmingly in favor of one party that a reasonable jury could not have concluded" as it did. *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 148 (5th Cir. 1995), *cert. denied*, 516 U.S. 1047 (1996).

The Court has said that "the *McDonnell Douglas* formula does not require direct proof of discrimination...." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977). Further, "[a]s in any lawsuit, the plaintiff may prove his case by direct or circumstantial

evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves." *Aikens*, 460 U.S., at 714 n.3 (1983). The trier of fact in this case, the jury, did consider all of the evidence and concluded not only that Reeves was the victim of age bias, but that the discrimination was willful.

As explained in *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216 (5th Cir. 1995), "a plaintiff can prove age discrimination in two ways. A plaintiff can prove discriminatory animus by direct evidence or by an indirect or inferential method of proof." Discrimination can be shown indirectly following the "pretext" model of *McDonnell Douglas*. "The shifting burdens . . set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979). If, however, a plaintiff produces direct evidence of discrimination, the *McDonnell Douglas* test is "inapplicable," *Thurston*, 469 U.S. at 121, and plaintiff may proceed under the mixed motives theory of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

The differences between the two methods of proof were summarized in *Mooney*:

> Unlike *McDonnell Douglas*, which simply involves a shifting of the burden of *production*, *Price Waterhouse* involves a shift of the burden of *persuasion* to the defendant. In other words, under *Price Waterhouse*, once a plaintiff presents direct evidence of discrimination, the burden of proof shifts to the employer to show that the same adverse employment decision would have been made regardless of discriminatory animus. If the employer fails to carry this burden, plaintiff prevails.

54 F.3d at 1216-17 (emphasis in original).

Although direct evidence is required for plaintiff to invoke the much more advantageous *Price Waterhouse* mixed motives analysis, the indirect *McDonnell Douglas* method imposes no such requirement. Indeed, such a requirement would be inconsistent with *McDonnell Douglas* which allows a plaintiff to rely on the inferences the factfinder is permitted to draw from his circumstantial proof. *Hicks*, 509 U.S. at 511. The Fifth Circuit previously has confirmed as much: "*Hicks* does not cast aside circumstantial evidence as a means of allowing a factfinder to infer discrimination." *Rhodes*, 75 F.3d at 993. Rather, to support an inference of discrimination under *McDonnell Douglas*, "the employee must," as Reeves has done here, "provide some evidence, *direct or circumstantial*, to rebut each of the employer's proffered reasons and allow the jury to infer that the employer's explanation was a pretext for discrimination." *Scott v. University of Mississippi*, 148 F.3d 493, 504 (5th Cir. 1998) (emphasis added) (citations omitted).

D. Chestnut's Ageist Comments Were Sufficient Indirect Evidence Of Age Discrimination.

Relying on its earlier decision in *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996), the court below stated that ageist comments can be sufficient evidence of discrimination if they are:

> (1) proximate in time to the termination; (2) made by an individual with authority over the challenged employment decision; and (3) related to the employment decision. Mere "stray remarks" - i.e., comments which are "vague and remote in time" - however, are insufficient to establish discrimination.

Reeves, at 612.

Notwithstanding that the potentially damning comments here were (1) specifically directed at Reeves, (2) the first just months before his termination and the second,

which directly stated Chestnut's age bias, within two months of his termination, (3) by a senior decisionmaker directly and intimately involved in the termination decision and who had extraordinary power, and despite the fact that the jury inferred that the comments were related to the decision to fire Reeves, the court rejected them as insufficient because "it is clear that these comments were not made in the *direct context* of Reeves's termination." *Id.* (emphasis added). Given Chestnut's status both within the company and as the husband of the company president, his involvement in the termination decision, and the closeness in time of his comments to Reeves's firing, such a finding clearly violates the standard upon which the court purportedly relied.

The fallacious reasoning behind the refusal to assign significant probative value to the ageist comments of Chestnut, and which the court itself characterized as "potentially damning," is reflected in the unsupportable decision of the Fourth Circuit in *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 512 (4th Cir.), *cert. denied*, 513 U.S. 1058 (1994), in which the court said that "statements about age may well not carry the same animus as those about race and gender." While perhaps true, such a statement vividly demonstrates that the court did not view the evidence in the light most favorable to the nonmoving party (plaintiff). Nonetheless, the *Birkbeck* court concluded that the comment at issue "reflects no more than a fact of life and as such is "merely a truism that carries with it no disparaging undertones." *Id.* (internal quotation marks omitted).

In *Dockins v. Benchmark Communications*, 176 F.3d 745, 749 (4th Cir. 1999), the court further exposed its flawed rationale for discounting ageist comments: "[S]tatements about age, unlike statements about race or gender, do not rest on a we/they dichotomy and therefore do not create the same inference of animus." The court reasoned that "barring unfortunate events, everyone will enter the protected age group at some point in their lives." *Id.* citing *Birkbeck*, 30 F.3d at 512.

It is, of course, true that age discrimination was not born of the same shameful legacy of slavery as is race discrimination. Neither does it have the same harsh antecedents as gender discrimination. Nevertheless, since individuals can age only in one direction - older, the status of "older worker," employed people age 40 and older protected by the ADEA, is based on a dichotomy just as surely as are differences of race and gender. Once attained, the status of older worker is quite as irreversible as one's race, gender, or other characteristic protected by Title VII.[10/] Thus, "while aging is a process of change which is experienced by everyone, the attainment of 'old age' - the condition upon which age discrimination is based - places an individual in a class to which he will always belong."[11/] Further, "[a]ge, like race and gender, is a characteristic that a person has neither chosen nor has the power to change."[12/]

Even if an ageist comment "was not directly related to the adverse employment decision[] (and as such is not, standing alone, direct proof of discrimination), statements of a decisionmaker that are unrelated to the adverse employment decision are nevertheless relevant to the jury's verdict when considered together with other evidence of pretext ...." *Bevan v. Honeywell, Inc.*, 118 F.3d 603, 611 (8th Cir. 1997). Further, the two "damning" comments at issue here are "surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow...." *MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1058 (8th Cir. 1988).

The decision of the court below in the present case sharply contrasts with its recent decision in *Haas v. ADVO Sys.*, 168 F.3d 732, 733 (5th Cir. 1999), in which the *only* evidence of pretext was the statement to the plaintiff, an

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10/ *See* Howard C. Eglit, Age Discrimination §2.12, at 2-30 (1986).

11/ Note, *Age Discrimination in Employment*, 50 N.Y. L. Rev. 924, 930 n.37 (1975).

12/ Howard C. Eglit, Age Discrimination §1.02, at 1-12 (2d ed. 1994).

unsuccessful job applicant, by an interviewer who was "influential" in the hiring process, that his "only concerns about hiring [Haas] were [his] age." The *Haas* court, relying on the same *Brown* four-part test as the court below, held that the statement should "be viewed as evidence of discrimination as a matter of law." *Id.* at 733-34. There is very little, if any, difference between the comment in *Haas* and Chestnut's statement that Reeves was "too damn old to do the job," yet Chestnut's statement was held to be insufficient.

Contrary to the conclusion of the court below, Chestnut's remarks, like those in *Haas*, appear to satisfy all four of the *Brown* parameters for probative evidence of discrimination. Considering that the speaker was Chestnut, the first comment, that Reeves was so old that he "must have come over on the Mayflower," can be fairly taken to imply that Chestnut believed that age was affecting Reeves's job performance. Moreover, the second, that Reeves was "too damn old to do the job," made directly to Reeves while he was working, within two months of his termination, like the comment in *Haas*, directly states the unlawful discrimination that the ADEA was enacted to combat. Thus, both of Chestnut's comments are exceptionally probative evidence of age discrimination and, along with Reeves's other evidence, are sufficient to support the verdict.[13/]

II. THE COURT BELOW ERRED BY SUBSTITUTING ITS JUDGMENT FOR THAT OF THE JURY.

The standard for evaluating a motion for judgment as a matter of law and a motion for summary judgment is the same. *See Celotex Corp. v. Catrett*, 477 U.S. 316, 323 (1986) ("'[T]h[e] standard [for granting summary judgment] mirrors the standard for a [judgment as a matter of law] under

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[13/] *See Beaver v. Rayonier, Inc.*, 196 F.3d 1354 (11th Cir. 1999) (ageist comment coupled with other evidence of discrimination is sufficient to support verdict.)

Federal Rule of Civil Procedure 50(a)....'") *quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Rhodes*, 75 F.3d at 993 n.4. The only significant difference between the two is that the record is much more complete post-trial. The Court long ago established that in deciding such motions, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255, *citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *see Matsushita Elec. Inds. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 572 , 587-88 (1986). In substituting its evaluation of the evidence for that of the jury, the court below violated this rule by crediting Sanderson's evidence and drawing inferences of questionable legal import against Reeves.

In addition to Chestnut's two ageist comments, Reeves introduced other evidence that along with these remarks was sufficient to support the jury's finding that Sanderson's purported nondiscriminatory reason for Reeves's termination, "shoddy record keeping," was, indeed, a pretext for age discrimination.

Reeves established that on several occasions Chestnut referred to him as "old man," (Tr.24, 76), and that he was harassed and "cussed out" by Chestnut, (Tr. 26). Reeves evidence also showed that Sanderson changed its reason for terminating him between the time he was fired and the time of trial. Along with the ageist comments, Reeves' evidence raised not only disbelief, but in the language of *Hicks*, 509 U.S. at 511, "a suspicion of mendacity" regarding Sanderson's stated reasons for the discharge.

Rather than "believ[ing]" Reeves and drawing all "justifiable inferences ... in his favor," *Anderson*, 477 U.S. at 255, the court below concluded:

> Although proof that an employer lied to its employee about its reasons for discharge does, under some circumstances, raise a "red flag" of pretext, the inconsistency noted by Reeves in this case can hardly be considered

> mendacious. Sanderson has, at all times, supported its decision to fire Reeves with the charge that Reeves's work performance was unsatisfactory. That Sanderson may have explained this charge at the time of dismissal with only one instance of inaccurate record keeping, but buttressed its defense by adducing evidence of other similar infractions at trial smacks more of competent trial preparation than telling a lie.

Reeves, at 612.

Conceding that on Reeves's evidence "a reasonable jury could have found that Sanderson's explanation for its employment decisions was pretextual," *id.*, the court nevertheless rejected the jury's ultimate finding of discrimination. By crediting Sanderson's evidence instead of that of Reeves and failing to draw inferences clearly supported by that evidence in Reeves's favor, the court below not only transgressed this Court's guidance in *Anderson*, 477 U.S. at 255, but also impermissibly usurped the function of the jury:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.

Id.

The role of a reviewing court is to determine whether there is an evidentiary basis for the jury's verdict. Long ago, this Court stated that "when that evidentiary basis becomes apparent, it [is] immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Lavender v. Kurn*, 327 U.S. 645, 653 (1946). The jury's verdict should be overturned "[o]nly when there is a complete absence of probative facts to support the conclusion reached ...." *Id.* The court is permitted to

intercede only if the record reflects "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture." *Norton v. Sam's Club*, 145 F.3d 114, 118 (2d Cir. 1998). Where, as in this case, there is substantial evidence supporting the jury's verdict, the court of appeals clearly has erred in reversing the verdict for Reeves.

III. THE COURT BELOW RELIED ON SUSPECT PRO-EMPLOYER COUNTERINFERENCES.

In rejecting the jury's verdict that Sanderson fired Reeves because of willful age discrimination, the court relied on counter-inferences of questionable validity, stating that (1) "the record shows that at least two of the decision makers were themselves over the age of 50," and (2) "at the time Reeves was dismissed, 20 of the management positions were filled by people over the age of 50, including several employees in their late 60's." *Reeves*, at 613. Left unstated is the inference (or counterinference, since the facts arise from defendant's proof) that the court obviously drew from each: first, that people in the same protected group as the plaintiff are unlikely to discriminate against members of that group; and second, that a bottom line result reflecting that some members of the protected group did not suffer discrimination shows a lack of motivation to discriminate against the plaintiff.

Not only is each of these counterinferences based on questionable reasoning, they weaken the enforcement of all employment discrimination laws by erecting formidable judicial barriers to a plaintiff's ability to prove his case.

A. Older as Well as Younger Decisionmakers Can Be Infected by Age Bias.

Without articulating its reasoning, the court below relied on the "older decision maker"[14/] doctrine to draw an inference of nondiscrimination because persons making the allegedly discriminatory employment decision are also in the protected age group, *i.e.*, age forty and older. Although it is bereft of logical or sociological support, the theory behind this device is that members of the protected class "are more likely to be victims of age discrimination than its perpetrators." *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1471 (11th Cir. 1991) (reversing an age discrimination jury verdict for the plaintiff).

This inference is contrary to a long established precept of this Court, i.e., that persons of the same class or group can and, indeed, do discriminate against each other. For example, more than thirty years ago, in *Castaneda v. Partida*, 430 U.S. 482 (1977), the Court upheld a challenge by a Mexican-American prisoner to the "key man" grand jury selection process, despite Texas' assertions that the Mexican-American prisoner's Fourteenth Amendment rights could not have been violated because three of the five jury commissioners were Mexican-American and the pool from which the jurors was chosen was largely Mexican-American. The Court concluded that "because of the many facets of human motivation, it would be unwise to presume as a matter of law that human

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[14/] *See, e.g., Richter v. Hook-Superx, Inc.*, 142 F.3d 1024, 1032 (7th Cir. 1998) (There is no inference of age discrimination when "decision-makers were themselves 46, 53, and 60 years old at the time of the decision. While not dispositive, this Court has found it significant that individuals alleged to have discriminated on the basis of age were themselves members of the protected class."); *Molenda v. Hoechst Celanese Corp.*, 60 F. Supp 2d 1294, 1304 (S.D. Fla. 1999) (The fact that both decisionmakers were in the protected age group, ages 55 and 56, and were substantially older than the 41 year old plaintiff contributed to the court's conclusion that no unlawful discrimination occurred).

beings of one definable group will not discriminate against other members of that group." *Id.* at 499.

In his concurrence in *Castaneda*, Justice Marshall described how a person of one protected class could readily discriminate against another member of that same class:

> In the first place, Mr Justice Powell's assumptions about human nature [that persons of the same race would not discriminate against each other], plausible as they may sound, fly in the face of a great deal of social science theory and research. Social scientists agree that members of [protected classes] frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority. Such behavior occurs with particular frequency among members of [protected classes] who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group.

Id. at 503 (footnotes omitted).

Recently, the Court unequivocally reacknowledged that intra-group discrimination was possible and, indeed, actionable under Title VII in the case of a male oil rig roustabout who was sexually harassed by his male supervisors and other males:

> If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination"because of ... sex" merely because the plaintiff and the defendant(or the person charged with acting on behalf of the defendant) are of the same sex.

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, __, 118 S.Ct. 998, 1001-02 (1998).

The reason for such a conclusion is straightforward: It strains credulity to assume that simply because a person is a member of the protected group, he or she is incapable of or unwilling to unlawfully discriminate on the basis of the protected characteristic, *e.g.*, sex, race, age, etc., against another person in the protected group. "The proposition that people in a protected category cannot discriminate against their fellow class members is patently untenable." *Danzer v. Norden Systems, Inc.*, 151 F. 3d 50, 55 (2d Cir. 1998).

The unstated counterinference drawn by the court below, that there could not have been age discrimination against the 57-year-old Reeves simply because two of the four decisionmakers were over age 50, is an impermissible basis for overturning the jury's verdict.

B. The Court of Appeals Erred By Inferring That Because Sanderson Did Not Discriminate Against Other Older Employees It Did Not Discriminate Against Reeves.

The second unexplained factor relied on by the court below to overturn the jury verdict for Reeves, was that "there is evidence that, at the time Reeves was dismissed, 20 of the company's management positions were filled by people over the age of 50, including several employees in their late 60's." *Reeves*, at 613. This reasoning is based on the same fallacious bottom line analysis that the Court unequivocally rejected in *Connecticut v. Teal*, 457 U.S. 440, 455 (1982): "Congress never intended to give an employer license to discriminate against some employees ... merely because he treats favorably

other members of the employees' group."[15] In this disparate treatment case, the nondiscriminatory treatment of other persons in the protected age group is simply not relevant to the issue of whether Reeves was discriminated against. Based on the evidence, the jury concluded that Sanderson discriminated against Reeves because of his age and that the discrimination was willful. It is not Reeves's evidence that is insufficient here. Rather, what is insufficient are the reasons the court below provided for overturning the jury's verdict.

IV SUFFICIENCY OF THE EVIDENCE IS NO SUBSTITUTE FOR A PROPER *McDONNELL DOUGLAS* ANALYSIS.

In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996), the Court assumed without deciding that the basic evidentiary framework set forth in *McDonnell Douglas* is fully applicable to claims under the ADEA.[16] AARP urges the Court to reaffirm that decision by

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[15] *See also Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978)("[A] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination . . . . It is clear beyond cavil that the obligation imposed by Title VII is to provide equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's races are already proportionately represented in the work force.") (citations omitted).

[16] Every court of appeals has also embraced the *McDonnell Douglas/Burdine* framework as being applicable to ADEA-based claims. *See, e.g., Sanchez v. Puerto Rico Oil, Co.*, 37 F.3d 712, 719 (1st Cir. 1994); *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998); *Showalter v. University of Pittsburgh Med. Ctr.*, 190 F.3d 231, 234 (3d Cir. 1999); *Dockins v. Benchmark Communications*, 176 F.3d 745 (4th Cir. 1999); *Haas v. ADVO Sys., Inc.*, 168 F.3d 732 (5th Cir. 1999); *Scott v. Goodyear Tire & Rubber Co.*, 160 F.3d 1121 (6th Cir. 1998); *Wichmann v. Board of Trustees of Southern Illinois Univ.*, 180 F.3d 791, 803 (7th Cir. 1999); *Vaughn v. Roadway Express, Inc.*, 164 F.3d 1087, 1090 (8th Cir. 1998); *Ritter v. Hughes*

holding that Reeves presented sufficient evidence to support the verdict in his favor under the *McDonnell Douglas* indirect method of proof as construed by *Hicks*.

Although many courts have departed from the Court's original objective in formulating the *McDonnell Douglas* proof paradigm,[17/] when it is properly interpreted and applied, it is critical to the ability of age discrimination plaintiffs to prove their claims. Indeed, the Court has acknowledged, "[t]he objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her." *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995).

It would be not only illogical, but impractical indeed, to establish a unique evidentiary framework for the ADEA separate from other employment discrimination statutes because there is "no inherent reason why *McDonnell Douglas* is any less a 'sensible, orderly way to evaluate the evidence' in an age case than in any other." *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1015 (1st Cir. 1979), quoting *Furnco*, 438 U.S. at 577. Additionally, the Court has acknowledged that the ADEA is an integral part of this nation's collective law prohibiting employment discrimination:

> The ADEA, enacted in 1967, as part of an ongoing congressional effort to eradicate

Aircraft Co., 58 F.3d 454 (9th Cir. 1995); *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159 (10th Cir.), *cert. denied*, 119 S. Ct. 617 (1998); *Benson v. Tocco, Inc.*, 113 F.3d 1203, 1207 (11th Cir. 1997); *Aka v. Washington Hospital Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998).

17/ "[T]he entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J. concurring); *see also Thurston*, 469 U.S. at 121 ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the plaintiff [has] his day in court despite the unavailability of direct evidence.").

> discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1988 ed. and Supp. V) (race, color, sex, national origin, and religion); the Americans with Disabilities Act of 1990, 42 U.S.C. § 1201 *et seq.* (1988 ed., Supp. V) (disability); the National Labor Relations Act, 29 U.S.C. § 158(a) (union activities); the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (sex).

McKennon, 513 U.S. at 357.[18/] "The mere fact that Congress chose to pass a separate statute rather than to amend Title VII does not imply that age discrimination was intended to be subject to different standards and methods of proof than race or sex discrimination." *Loeb*, 600 F.2d at 1015. Because age discrimination victims, like all other victims of employment discrimination, are unlikely to have direct evidence, they must continue to be afforded the means of ensuring that they will have their day in court.

18/ The Court has made the identical observation on several other occasions. *See, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) ("[T]he ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace . . . ."); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) ("There are very important similarities between [Title VII and the ADEA], . . . both in their aims – the elimination of discrimination from the workplace – and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII."); *Thurston*, 469 U.S. at 121 ("The substantive, antidiscrimination provisions of the ADEA were modeled upon the prohibitions of Title VII.").

CONCLUSION

The court below misconstrued *Hicks* to allow it to substitute its independent evaluation of the evidence for that of the jury based on pro-employer counterinferences of questionable validity, even though all three *Hicks* requirements, a *prima facie* case, proof of pretext, and a finding of discrimination were satisfied. By imposing what is tantamount to a requirement that plaintiffs must produce direct evidence of discrimination in order to prevail, the decision of the court below so distorts the *McDonnell Douglas* proof paradigm, which was designed to insure an impartial hearing for employment discrimination plaintiffs, that it is all but unrecognizable. The Court must not countenance the evisceration of the ADEA as well as Title VII and other civil rights statutes by ratifying a proof requirement that almost no plaintiff can meet and which the Court has heretofore emphatically rejected.

To the contrary, in order to assure the fairness to employment discrimination plaintiffs the Court sought to achieve in *McDonnell Douglas*, the Court should reverse the judgment of the court below and hold that Reeves's evidence was sufficient to sustain the jury's verdict of willful discrimination in his favor.

Respectfully submitted,

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